

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL A. ROMERO,

Defendant.

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8:04CR512

MEMORANDUM AND ORDER

This matter is before the court on the defendant's Motion to Proceed in Filing Rule 60(b) (Filing No. 73), and his Motion to Proceed In Forma Pauperis (Filing No. 74). Because the defendant's motion has the indicia of a "Motion to Vacate, Set Aside, or Correct Sentence by a Federal Prisoner under 28 U.S.C. § 2255 (§ 2255)", the court will construe the pleading as a § 2255 motion. However, the United States Supreme Court has warned the federal courts not to recharacterize a pro se motion as a first § 2255 motion without informing the pro se litigant of the consequences of the recharacterization and allowing the litigant the opportunity to contest the recharacterization of, or to withdraw or amend the motion. See *Castro v. United States*, 540 U.S. 375, 377 (2003):

[W]e hold that the court cannot so recharacterize a *pro se* litigant's motion as the litigant's first § 2255 motion *unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing. Where these things are not done, a recharacterized motion will not count as a § 2255 motion for purposes of applying § 2255's "second or successive" provision.

Therefore, based on this authority, the defendant is allowed to amend or withdraw his § 2255 motion. The Clerk of Court is directed to send the defendant a copy of the standard § 2255 motion form which the defendant may use to amend his § 2255 motion.

If the defendant wishes to withdraw his § 2255 motion, he shall inform the court by June 29, 2007. If the defendant does not respond to this Order, the court will move forward with deciding the § 2255 motion. The court advises the defendant the record indicates that it is likely that the defendant's § 2255 motion is not within the one-year statute of limitation imposed by the Antiterrorism and Effective Death Penalty Act of 1996.

IT IS ORDERED:

1. That the defendant's Motion to Proceed In Forma Pauperis (Filing No. 74) is granted;
2. On or before June 29, 2007, the defendant shall inform the court if he wishes to withdraw his § 2255 motion;
3. On or before June 22, 2007, the defendant will provide the court with any amendments that he wishes to make to his § 2255 motion; and
4. The Clerk is directed to send a copy of this Order and a § 2255 motion form to the defendant at his last known address.

DATED this 31<sup>st</sup> day of May, 2007.

BY THE COURT:

s/Joseph F. Bataillon  
JOSEPH F. BATAILLON  
Chief United States District Judge